

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF
DON KENNEDY REAL ESTATE,
RICHARD HENDERSON and
LINDA LEE DORSEY,

Appellants,

v.

PUGET SOUND AIR POLLUTION
CONTROL AGENCY,

Respondent.

PCHB No. 86-27

DECISION ON MOTION
FOR RECONSIDERATION

On the 28th day of May, 1986, the Pollution Control Hearings Board published Final Findings of Fact, Conclusions of Law and Order in the above-captioned matter.

There followed receipt of a letter and enclosures from appellant Don Kennedy Real Estate indicating his compliance with terms of the Order requiring cooperation in disseminating information to trade associations and others about asbestos removal standards. He suggested he would accomplish additional compliance as desired by the

1 Agency.

2 Shortly thereafter, on June 5, 1986, counsel for respondent PSAPCA
3 filed a Motion for Reconsideration, pursuant to WAC 371-08-200(1)(b),
4 stating the Board exceeded its authority by suspending part of the
5 civil penalty for such community service.

6 Oral argument was made before the Board on June 18, 1986, at
7 Seattle, Washington.

8 After consideration of the argument, letters, motion and complete
9 review of the records and files on this matter, the Board elects to
-0 modify the Final Order as set forth below.

1 In all other respects the motion is denied.

'2

.3

4

'5

'6

.7

'8

9

.0

'1

2

3

'4

'5

'6

'7

DECISION ON MOTION
FOR RECONSIDERATION
PCHB No. 86-27

ORDER


The asserted violations related to wetting material and properly bagging contaminated waste are reversed. The violation of failure to notify PSAPCA is upheld. \$650 of the penalty is vacated as excessive. The remaining \$350 is suspended; provided that appellants do not commit any violations of respondent's regulations for a period of one year from the date of issuance of this Order.

DONE this 27th day of June, 1986.

POLLUTION CONTROL HEARINGS BOARD


GAYLE ROTHROCK, Vice Chairman

 6/27/86
LAWRENCE J. FAULK, Chairman


WICK DUFFORD, Lawyer Member

DECISION ON MOTION
FOR RECONSIDERATION
PCHB No. 86-27

1
2
3
4
5
6
7
8
9
0
1
2
3
4
5
6
7
8

BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF
DON KENNEDY REAL ESTATE,
RICHARD HENDERSON and
LINDA LEE DORSEY,

Appellant,

v.

PUGET SOUND AIR POLLUTION
CONTROL AGENCY,

Respondent.

PCHB No. 86-27

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND
ORDER

THIS MATTER, the appeal of a notice and order of civil penalty for \$1,000 for purportedly unauthorized and unsafe removal of asbestos from an apartment house boiler room, came on for hearing before the Board on May 2, 1986, at Lacey, Washington. Seated for and as the Board were; Wick Dufford and Gayle Rothrock (presiding). Lawrence Faulk has reviewed the record. Pursuant to Chapter 43.21B.230 RCW respondent PSAPCA elected a formal hearing and the matter was officially reported by Lisa Flechtner of Barker and Associates.

1 Respondent public agency appeared and was represented by Keith D.
2 McGoffin. Appellants Don Kennedy Real Estate and Linda Lee Dorsey
3 appeared through Don Kennedy. Richard Henderson represented himself.

4 Witnesses were sworn and testified. Exhibits were admitted and
5 examined. Argument was heard. From the testimony, evidence, and
6 contentions of the parties the Board makes these

7 FINDINGS OF FACT

8 I

9 The Puget Sound Air Pollution Control Agency (PSAPCA) is an
10 activated air pollution control authority under terms of the state's
11 Clean Air Act, empowered to monitor and enforce federal and state
12 emissions standards for hazardous air pollutants, including work
13 practices for asbestos.

14 PSAPCA has filed with the Board certified copies of its
15 Regulations 1 and 2, of which we take official notice.

16 II

17 Kennedy Real Estate (KRE) and Kennedy family members Don Kennedy,
18 and Linda Lee Dorsey are involved in property management and ownership
19 in Seattle. Ms. Dorsey owns an apartment house, the Levere
20 Apartments, at 4105 Brooklyn Ave N.E. and Kennedy Real Estate manages
21 it. This recently remodeled apartment house is the subject of the
22 regulatory action and of a civil penalty now here on appeal before the
23 Board.

24 III

25 On the fifth day of November, 1985 the state Department of Labor

26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW AND ORDER
PCHB No. 86-27

1 and Industries reported to PSAPCA an unauthorized asbestos removal
2 project occurring as part of a remodeling project at the Levere
3 Apartments in the University District. A boiler room next to a
4 laundry room area adjacent to an alley was the center of activity. A
5 sample of asbestos was independently taken at the site by the state
6 inspector. It was also reported asbestos fibers were loose on the
7 boiler room floor.

8 IV

9 The PSAPCA inspector arrived on site and noted some Tyvek work
10 clothing, (the type commonly worn for asbestos removal projects) in
11 the apartment's dumpster. She also noted the sample the state
12 inspector gave her did not feel moist. She ascertained the person
13 working at the site, appellant Richard Henderson, while apparently
14 pursuing a relatively standard asbestos removal program, had not filed
15 an official notice of intent to remove asbestos with PSAPCA.

16 V

17 To avoid exposure to herself and others, the PSAPCA inspector did
18 not enter the boiler room area which was separated from the laundry
19 room by a metal door and then further cordoned off by a commercial
20 plastic-type drape and wrapping known as Visqueen. She relied on the
21 unwitnessed state hygienist's account of his removal of a sample of
22 asbestos and strewing of fibers on the boiler room floor.

23 VI

24 Appellant Henderson testified he was instructed to get out and
25 stay out of the suspect area by the state inspector because he was

26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW AND ORDER
PCHB No. 86-27

1 not certified in asbestos removal. Prior to the inspector's arrival,
2 he had been working there in the prepared site for several days.

3 Henderson testified he had used 25 stowage bags, a number of Tyvek
4 suits, Visqueen, a respirator, a hose to water down asbestos areas
5 regularly, and a wet mop to regularly clean the asphalt tile floor in
6 the boiler room area at all times he was working on the project. He
7 said he had been a boilermaker and repairman at the Navy shipyards in
8 Bremerton, often working with asbestos removal. At the time the state
9 hygienist arrived he had half-stripped the asbestos jacket off the
10 boiler and dealt with the hot water tank, regularly spraying with
11 water. He had done no work on the pipes. Under questioning he said
12 there may have been a bit of asbestos material fallen to the floor at
13 the back of the furnace. He did not know from where the asbestos
14 sample was taken because when it was taken he was not present, having
15 been ordered to remain outside the area. He said that he had wetted
16 all the asbestos materials he had stripped prior to removal and
17 disposal.

18 VII

19 Henderson testified that he had never placed any Tyvek clothing in
20 the apartment's dumpster and had no idea who might have done so. He
21 said the suits he used were disposed of in sealed bags and that no
22 bags or other material from the removal project were placed in this
23 garbage bin.

24 The discarded Tyvek suit was not tested in any way to determine
25 whether it was contaminated with asbestos fibers.

26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW AND ORDER
PCHB No. 86-27

VIII

The PSAPCA inspector took the state inspector's asbestos sample and from it concluded inadequate moisturizing was occurring on that job site. The state inspector did not testify. There is no evidence that the sample was taken from an active work surface, or that it was not wet when taken.

IX

Following the site visit the PSAPCA inspector contacted Don Kennedy who agreed to halt all remodeling work on that and several other projects until Richard Henderson took a course and became a certified asbestos handler. Afterwards the inspector submitted the boiler room samples to a laboratory and later confirmed the sample was composed of chrysotile asbestos and other matter.

X

Appellant Henderson, sponsored by appellant Kennedy, did immediately enroll in, and satisfactorily complete, a certified asbestos safety handling course at a cost of \$500. He resumed work at that and other job sites for KRE without further incident. He testified that, after his completion of the course, he completed the job at issue without needing to make any significant change in the procedures used. There is no evidence that anyone was exposed to asbestos fibers as a result of this job.

XI

A notice of violation (#21800) was issued November fifth to KRE, Richard Henderson, and L.L. Dorsey for failure to meet federal and

1 state requirements for filing notice with the proper local authority
2 of intent to remove hazardous materials. Additionally the same
3 parties received a notice of violation (#21801) for failure to
4 adequately dampen asbestos materials such that they remain wet until
5 collected and bagged for disposal. Finally, these same parties
6 received Notice of Violation #21802 for failure to seal all
7 asbestos-contaminated materials in leak-proof containers (those in the
8 dumpster).

9 XII

10 There followed on January 27, 1986 a formal Notice and Order of
11 Civil Penalty #6401 to appellants citing violation of federal
12 (NESHAPS) and state standards for asbestos removal and assessing a
13 fine of \$1,000.

14 XIII

15 On February 14, 1986 Kennedy, Henderson, and Dorsey appealed the
16 penalty to the Board, feeling aggrieved about some of the citations
17 and the amount of fine under the circumstances. None of the
18 appellants had been subject of any previous PSAPCA enforcement actions
19 and none have been since the events at issue.

20 The matter became our cause number PCHB 86-27.

21 XIV

22 Any Conclusion of Law which is deemed a Finding of Fact is hereby
23 adopted as such.

24 From these Findings of Fact the Board comes to these
25

26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW AND ORDER
PCHB No. 86-27

1 CONCLUSIONS OF LAW

2 I

3 The Board has jurisdiction over these persons and these matters.
4 Chapters 70.94 and 43.21B RCW.

5 II

6 WAC 173-400-075 adopts the National Emission Standards for
7 Hazardous Air Pollutants (NESHAPS), including the work practices for
8 asbestos removal. The local air pollution control authorities, such
9 as PSAPCA, have power to enforce these standards, RCW 70.94.331(6),
10 70.94.785. The state's Department of Labor and Industries also
11 actively regulates asbestos removal under authority of the Washington
12 Industrial Safety and Health Act. 40 CFR, Part 61 addresses asbestos
13 safety handling and disposal practices in detail. Only persons
14 specially trained and certified in asbestos handling can readily be
15 assured of meeting detailed requirements therein prescribed.
16 Standards are designed to avoid the possibility of persons developing
17 lung cancer, pleural mesothelioma, peritoneal mesothelioma or
18 asbestosis.

19 III

20 PSAPCA properly responded to an alert from a state inspector and
21 made a site visit documenting a removal project occurring without a
22 Notice of Intent having been filed with PSAPCA. 40 CFR 61.146

23 IV

24 40 CFR 61.147(e)(1) requires asbestos materials that have been
25 removed or stripped to be "adequately wet" to ensure that they remain

26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW AND ORDER
PCHB No. 86-27

1 wet until they are collected for disposal. We conclude that the
2 agency failed to prove non-compliance within this requirement.

3 V

4 40 CFR 61.152(b)(1)(iii) provides for bagged disposal in
5 leak-tight containers of all asbestos-containing waste material,
6 (including contaminated clothing). It was not proven that the used
7 Tyvek clothing in the dumpster was contaminated or that it was thrown
8 in there by Kennedy, Henderson, or Dorsey. Therefore, the charge of
9 inadequate care and disposal of clothing was not sustained.

10 VI

11 The only violation shown - failure to notify - was the result of
12 not knowing the rules. Ignorance is not an excuse for failure to
13 comply with air pollution control regulations imposed under state
14 law. However, the primary purpose of the civil penalty is to affect
15 behavior - both that of the perpetrators and that of the public in
16 general. It is clear that the appellants have been adequately
17 influenced toward future compliance by these enforcement proceedings.
18 We conclude that the broader purpose of the sanction will
19 appropriately be served by the Order set forth below.

20 VII

21 Any Finding of Fact which deemed a Conclusion of Law is hereby
22 adopted as such.

23 From these Conclusions of Law the Board enters this
24
25

26 FINAL FINDINGS OF FACT,
27 CONCLUSIONS OF LAW AND ORDER
PCHB No. 86-27

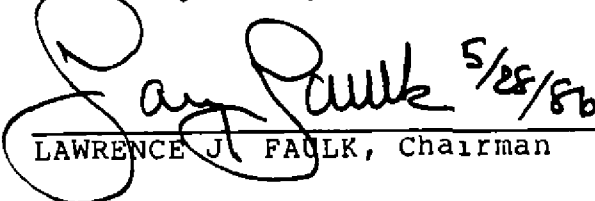
ORDER

The asserted violations related to wetting material and properly bagging contaminated waste are reversed. The violation of failure to notify PSAPCA is upheld. \$650 of the penalty is vacated as excessive. The remaining \$350 is confirmed; provided that, this latter amount is suspended on condition appellants (or any one of them) within six months hereof provide PSAPCA with public information assistance on making asbestos removal rules known (through trade association meetings or other means acceptable to the agency). Upon timely compliance with this requirement, the penalty shall be expurged from PSAPCA's record.

DONE this 28th day of May, 1986.

POLLUTION CONTROL HEARINGS BOARD


GAYLE ROTHROCK, Vice-Chairman

 5/28/86
LAWRENCE J. FAULK, Chairman


WICK DUFFORD, Lawyer Member

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER
PCHB No. 86-27